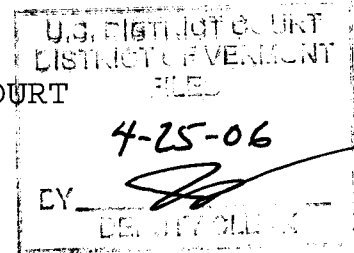


UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT



Joshua J. Muhammad, :  
Plaintiff, :  
v. : File No. 1:05-CV-146  
Steven Gold, Sue Blair, :  
Clus Dubois, David Turner, :  
Cotov, Jackson, Torres, :  
New York State Department :  
of Corrections and Parole :  
Division, Vermont State :  
Department of Corrections, :  
Defendants. :

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION  
(Paper 26)

Plaintiff Joshua Muhammad, a Vermont inmate proceeding *pro se*, brings this action pursuant to 42 U.S.C. § 1983. In his complaint, Muhammad claims that New York officials, with the assistance of Department of Corrections personnel in Vermont, illegally seized him, transported him to New York, and held him without legal justification. Defendants New York State Department of Correctional Services ("NYDOCS"), New York State Division of Parole ("NYSDOP"), Judith Jackson, Ruben Torres and Anthony Cotov (collectively "New York Defendants") have moved for summary judgment (Paper 26), arguing that Muhammad's claims are barred, *inter alia*, by the fact that he previously waived his right to resist or

challenge any extradition to the State of New York. For the reasons set forth below, I recommend that the motion for summary judgment be GRANTED.

Factual Background

On June 13, 1994, Muhammad was convicted by a New York state court of robbery in the second degree, grand larceny, and attempted robbery in the second degree. As a result of his conviction, Muhammad was sentenced to 2½ to 7½ years in prison.<sup>1</sup> Muhammad claims that after he served his minimum sentence of 2½ years, he was released to the parole supervision of the NYSDOP. Muhammad subsequently violated his conditions of release, and was returned to the custody of the NYDOCS.

In November, 1999, Muhammad was again released to the supervision of the NYSDOP, violated his conditions of release, and was returned to NYDOCS custody until October, 2001. Muhammad subsequently violated the terms of his parole a third time, and was issued a notice of violation of parole on March 3, 2003. At that time, he explains, "it was stipulated that I owed a maximum of 10

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<sup>1</sup> In much of the documentation submitted by the parties, Muhammad is referred to as Joshua Atterbury.

months and 12 days until my maximum term was to be fulfilled . . . ." (Paper 32 at 3). He therefore believed that his maximum sentence would conclude on January 10, 2004. (Paper 27, Ex. C at 2).

On November 26, 2003, Muhammad was released to the NYSDOP. Prior to his release on parole in 2003, Muhammad executed a Certificate of Release of Parole Supervision in which he consented to various conditions of release. Included in the Certificate of Release was Muhammad's waiver of his right to resist extradition to the State of New York. The waiver remained in effect until Muhammad's discharge from parole or conditional release.

The New York Defendants contend that when Muhammad executed the extradition waiver, his maximum sentence was set to conclude on July 10, 2004. This date is reflected in the documents submitted by both sides, including a copy of the signed Certificate of Release. (Paper 33-2 at 2). Nonetheless, as noted above, Muhammad claims that this release date was a mistake, and that his maximum sentence should have concluded in January, and not July, 2004.

By March 4, 2004, Muhammad had stopped attending

regularly-scheduled meetings with his parole officer. On April 7, 2004, Muhammad and his attorney telephoned the NYSDOP and reported that Muhammad did not believe he should still be on parole. Muhammad was instructed to appear at the NYSDOP that same day, but failed to do so. When Muhammad appeared at the NYSDOP on April 14, 2004, he failed a drug test. He was instructed at that time not to travel outside of the five boroughs of New York City without the permission of his parole officer.

On April 18, 2004, Muhammad was arrested in Burlington, Vermont and charged with the sale of cocaine and domestic assault. Muhammad had not received permission from his parole officer to come to Vermont. On April 20, 2004, the NYSDOP faxed to Vermont law enforcement authorities a warrant to be lodged as a detainer against Muhammad. On May 7, 2004, the NYSDOP declared Muhammad delinquent from parole supervision as of March 4, 2004.

Muhammad's bail was paid in Vermont on September 27, 2004, but he was not released. On October 5, 2004, Vermont state court Judge Mark Keller signed an "Order and Warrant for Arrest and Detention of Interstate

Fugitive" requiring that Muhammad be held by the Vermont Department of Corrections "for a time, not to exceed 30 days, awaiting arrest on such Governor's warrant as may issue . . . ." The next day, Vermont authorities notified the NYSDOP that Muhammad was available to be picked up for extradition. On October 12, 2004, Muhammad was extradited back to New York by defendants Jackson and Torres.

On October 22, 2004, Muhammad had a preliminary parole hearing at which the NYSDOP established probable cause to believe that he had violated the conditions of his release. At the outset of the hearing, Muhammad's attorney explained that at the time of his alleged violation Muhammad did not think he should still be on parole. "He believes there was a time calculation mistake at some point in the past, that instead of writing down 1-03, January, '03, 7-03 was written down." (Paper 28-9 at 6). Counsel also indicated that Muhammad had filed "a writ [of habeas corpus], which is the appropriate procedure." Id.

At his final parole hearing on December 21, 2004, Muhammad pled guilty to the charge of failing to notify

his parole officer of his April 18, 2004 arrest, but reserved the right to argue in his habeas proceeding that he was not on parole at that time. Specifically, Muhammad's attorney stated that his client

believes that he's no longer on parole and the basis of that claim is set forth in the Writ that he now has pending. So, we've entered - - I entered a guilty plea on [Muhammad's] behalf without prejudice to any claims he's making in Supreme Court with respect to the time that he owes and he wanted me to do that with the hope of, as he's noted, being released under this agreement in a matter of some days less than two weeks.

THE COURT: But he understands that the Supreme Court, the A.G. and the attorney, if any, on his open case, on his open writ, they will determine whether the guilty plea does void this?

COUNSEL: That's correct.

(Paper 28-12 at 9-10).

As a result of his guilty plea at the parole hearing, Muhammad's maximum term of incarceration in New York was set to expire on January 2, 2005. Muhammad's habeas corpus petition was dismissed as moot on January 5, 2005. Muhammad alleges that the dismissal was due, in part, to the fact that NYDOCS did not transport him to the habeas hearing. (Paper 27, Ex. B at 2).

On January 6, 2005, New York law enforcement

officials took custody of Muhammad on a Vermont warrant relating to his 2004 arrest in Burlington. Muhammad subsequently signed a waiver of extradition, was delivered to Vermont authorities, and was soon thereafter released in Vermont on the previously-paid bail. At the time of filing his instant complaint, Muhammad was serving an 11½ to 12 month sentence in Vermont on the domestic assault charge. (Paper 27, Ex. D).

Muhammad now claims that at the time of his extradition from Vermont in 2004, "[t]here was a writ of habeas corpus pending and a[n] order for a governor's warrant . . . ." Consequently, he argues, his extradition and subsequent detention in New York was in violation of his due process rights.<sup>2</sup>

### Discussion

#### I. Summary Judgment Standard

Summary judgment should be granted only when there is no genuine issue of fact and the moving party is

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<sup>2</sup> It is not clear from the complaint what type of relief Muhammad is seeking. The New York Defendants have submitted a document, drafted by Muhammad, entitled "Plaintiff Demands Trial By Jury" in which Muhammad seeks \$1,000,000 in damages. Although this document, dated August 10, 2005, includes the caption of this case, it was never received by the Court.

entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party has the initial burden of demonstrating that there is no genuine issue of material fact. See Marvel Characters, Inc. v. Simon, 310 F.3d 280, 286 (2d Cir. 2002); Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995) (stating that movant may meet burden by "point[ing] to an absence of evidence to support an essential element of the nonmoving party's claim."). Once the movant satisfies this burden, the non-moving party must respond by setting forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In determining whether summary judgment is appropriate, a court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." Williams v. R.H. Donnelley, Corp., 368 F.3d 123, 126 (2d Cir. 2004). "In addition, *pro se* litigants must be given extra latitude, particularly on a summary judgment motion." Thomas v. New York State Dep't of Corr. Servs., 2006 WL 435718, at

\*4 (S.D.N.Y. Feb. 23, 2006) (citing McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (*pro se* pleadings should be read liberally and interpreted "to raise the strongest arguments that they suggest"))).

## II. Waiver of Extradition

The New York Defendants first argue that because Muhammad waived his right to resist extradition to New York, his extradition and detention were lawful. Muhammad's waiver was effective through the end of his parole or conditional release. Muhammad contends that his parole ended prior to his arrest in Vermont. If Muhammad's parole did, in fact, terminate prior to his arrival in Vermont, it could be argued that the waiver of extradition was no longer in effect at that time.

The question of whether Muhammad's sentence was fully served prior to his April, 2004 arrest in Vermont is a matter in dispute. Muhammad claims that there was a scrivener's error, and may be able to produce NYDOCS records confirming that his scheduled release date should have been January, and not July, 2004. The defendants, of course, could come forward with facts to disprove his claims.

Because this case is still in the earliest stages, Muhammad has had no opportunity to engage in discovery. Although I recommend below that summary judgment be granted to the New York Defendants on other grounds, the likelihood of a factual dispute on the question of Muhammad's correct release date, and the fact that the outcome of that dispute might determine the validity of Muhammad's waiver, means that a summary judgment based on the waiver would be premature at this time.

### III. Qualified Immunity

The individual New York Defendants are, however, entitled to summary judgment on the basis of qualified immunity. Muhammad claims that defendants Jackson, Torres and Cotov knew that "you cannot hold a person pas[t] their maximum sentence," and that Cotov in particular was aware of Muhammad's ongoing dispute with the State of New York with respect to his release date. (Paper 32 at 9). In response, the New York Defendants claim that, in light of Muhammad's signed waiver, they could not have understood that they were violating Muhammad's constitutional rights.

When considering qualified immunity, the court must

consider whether the facts, taken in a light most favorable to the plaintiff, could show a constitutional violation. See Cowan v. Breen, 352 F.3d 756, 761 (2d Cir. 2003). If so, the court must determine whether the right in question was clearly established at the time the violation occurred, or if it would have been objectively reasonable for the official to believe that his conduct did not violate that right. See Saucier v. Katz, 533 U.S. 194, 201 (2001). If either the right was not clearly established or a reasonable official would not have believed his conduct would violate that right, the official is shielded from liability for civil damages. See Mandell v. County of Suffolk, 316 F.3d 368, 385 (2d Cir. 2003). Qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 353, 341 (1986).

Extraditing and holding a person without sufficient legal justification is arguably a violation of that person's constitutional rights. See Michigan v. Doran, 439 U.S. 282, 292-95 (1978) (Blackmun, J., Brennan, J., Marshall, J., concurring); Giano v. Martino, 673 F. Supp.

92, 93-94 (E.D.N.Y. 1987). In this case, however, the individual New York Defendants had reason to believe that their actions were legally justified. With respect to defendants Jackson and Torres, the allegation is that they removed Muhammad from Vermont "without any documents from the governor." (Paper 3 at 2). The undisputed facts show that Vermont authorities informed the NYSDOP that Muhammad was available for extradition. (Paper 28 at 4-5). When Jackson and Torres arrived in Vermont to perform the extradition, they were in possession of Muhammad's signed waiver. There is nothing in the record to suggest that Jackson and Torres had reason to doubt the waiver's validity. Consequently, and assuming that wrongful extradition is a violation of clearly established rights, Jackson and Torres were nonetheless reasonable in believing that their conduct did not violate Muhammad's rights.

The claim against defendant Cotov presents a closer question, since Muhammad alleges that Cotov was aware of his dispute with respect to his maximum sentence date. Muhammad also alleges that Cotov "claimed to have no control over such issues as time assessment." (Paper 33-

2 at 21). Even assuming that Cotov was aware of Muhammad's dispute, however, that fact is insufficient to render Cotov liable for Muhammad's extradition. Muhammad's correct release date is a matter that was taken before the New York state court on habeas corpus, and until the date was altered by that (or another) court, Cotov was justified in adhering to the date in his file. In other words, in the absence of a legal determination on the habeas petition, Cotov was reasonable in believing that Muhammad's extradition from Vermont was not a violation of Muhammad's clearly established constitutional rights. Accordingly, I recommend that the New York Defendants' motion for summary judgment with respect to individual defendants Jackson, Torres and Cotov be GRANTED.

#### IV. Sovereign Immunity

Muhammad's claims for money damages NYDOCS, NYSDOP, and all New York defendants sued in their official capacities are barred by the State of New York's sovereign immunity. Unless the state has waived its sovereign immunity under the Eleventh Amendment, a suit for money damages may not be maintained against the state

itself, or against any agency or department of the state. See Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 684 (1982). Section 1983 does not override a state's Eleventh Amendment immunity. See Quern v. Jordan, 440 U.S. 332, 342 (1979). Eleventh Amendment immunity also protects state officials sued for damages in their official capacities, since any recovery would be expended from the public treasury. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 n. 11 (1984). Accordingly, Muhammad's damages claims against the two state agencies, as well as defendants Jackson, Torres and Cotov in their officials capacities, should be DISMISSED.

#### Conclusion

For the reasons set forth above, I recommend that the New York Defendants' motion for summary judgment (Paper 26) be GRANTED, and that the claims against them be DISMISSED.

Dated at Burlington, in the District of Vermont,  
this day 24<sup>th</sup> of April, 2006.

/s/ Jerome J. Niedermeier  
Jerome J. Niedermeier  
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3, 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).